



## DEPARTMENT OF DEFENSE

### Office of the Secretary

### 32 CFR Part 310

[Docket ID: DoD-2021-OS-0048]

RIN 0790-AL13

### Privacy Act of 1974; Implementation

**AGENCY:** Office of the Secretary of Defense (OSD), Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Defense (Department or DoD) is giving concurrent notice of a new Department-wide system of records pursuant to the Privacy Act of 1974 for the DoD-0008, “Freedom of Information Act and Privacy Act Records” system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of this system of records from certain provisions of the Privacy Act because of national security requirements; to avoid interference during the conduct of criminal, civil, or administrative actions or investigations; to prevent the compromise of protective services processes; to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations; and to prevent the undermining of testing and evaluation materials.

**DATES:** Send comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods.

\* Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.

\* Mail: The DoD cannot receive written comments at this time due to the COVID-19 pandemic.

Comments should be sent electronically to the docket listed above.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number for this *Federal Register* document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <https://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Ms. Tracy Rogers, (703) 571-0070,  
OSD.DPCLTD@mail.mil.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

In accordance with the Privacy Act of 1974, the DoD is establishing a new DoD-wide system of records titled “Freedom of Information Act and Privacy Act Records,” DoD-0008. This system of records notice describes access requests and administrative appeals under the Freedom of Information Act (FOIA), and access and amendment requests and administrative appeals under the Privacy Act. The system consists of both electronic and paper records and will be used by DoD components and offices to maintain records about individuals who submit FOIA access requests, Privacy Act access and amendment requests, administrative appeals to the Department under either the FOIA or Privacy Act, and individual requests referred from other agencies. These records may include information regarding the requesters and their attorneys or representatives, the original request for access, amendment, and administrative appeal, and other supporting documentation to include related memoranda, correspondence, notes, statements of disagreement, and, in some instances, copies of requested records and records under administrative appeal.

### **II. Privacy Act Exemption**

The Privacy Act allows Federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including those that provide individuals with a right to request access to and amendment of their own records. If an agency intends to exempt a particular system of records, it must first go through the rulemaking process pursuant to 5 U.S.C. 553(b)(1)-(3), (c), and (e). This proposed rule explains why an exemption is being claimed for this system of records and invites public comment, which DoD will consider before the issuance of a final rule implementing the exemption.

The DoD proposes to modify 32 CFR part 310 to add a new Privacy Act exemption rule for the DoD-0008, Freedom of Information Act and Privacy Act Records system of records. In this proposed rulemaking, the Department proposes to exempt portions of this system of records from certain provisions of the Privacy Act because records and information in this system of records may fall within the scope of the Privacy Act exemptions. As stated in the DoD-0008 system of records notice, this system of records generally will not be deemed to cover underlying records that are responsive to an access or amendment request; rather, the system covers the access, amendment, or appeal requests themselves, correspondence created as a result of such requests, and certain other categories of records identified in the notice. In certain limited instances, however, entire records, portions thereof, or information from such underlying records may be recompiled to become part of this system. Certain records may also be recompiled from other exempt systems of records as a result of a request for access to such records under the Privacy Act or the Freedom of Information Act, or a request for amendment of a record under the Privacy Act. Recompiled records and information may fall within the scope of the Privacy Act exemptions claimed for those systems of records, specifically the exemptions set forth in 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(5), (k)(6), and (k)(7).

The DoD proposes this exemption rule for several reasons. First, some of the records in this system of records may contain information recompiled from other systems of records maintained by a DoD component or other agency which performs as its principal function

activities pertaining to the enforcement of criminal laws and the records contain investigatory material compiled for criminal law enforcement purposes. The Privacy Act, pursuant to 5 U.S.C. 552a(j)(2), authorizes agencies to claim an exemption for systems of records that contain this type of information. The DoD therefore is proposing to claim an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain record-keeping and notice requirements, to prevent, among other harms, the identification of actual or potential subjects of criminal investigation and/or sources of criminal investigative information and to avoid frustrating the underlying criminal law enforcement purpose for which the records were collected.

Additionally, some of the records in this system of records may contain classified national security information and providing notice, access, amendment, and disclosure of accounting of those records to an individual, as well as certain recordkeeping requirements, may cause damage to national security. The Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), authorizes agencies to claim an exemption for systems of records that contain information properly classified pursuant to executive order. The DoD therefore is proposing to claim an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain record-keeping and notice requirements, to prevent disclosure of any information properly classified pursuant to executive order, as implemented by DoD Instruction 5200.01 and DoD Manual 5200.01, Volumes 1 and 3.

The DoD is also proposing this Privacy Act exemption rule because this system of records may contain investigatory material compiled for law enforcement purposes recompiled from other systems of records within the scope of 5 U.S.C. 552a(k)(2). This exemption allows the Department to claim an exemption for systems of records that contain investigatory materials compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2), which is described above. The DoD therefore is proposing to claim an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of

accounting, and certain recordkeeping and notice requirements, to prevent, among other harms, the identification of actual or potential subjects of investigation and/or sources of investigative information and to avoid frustrating the underlying law enforcement purpose for which the records were collected.

The DoD also proposes an exemption for this system of records because the records may in certain instances contain information recompiled from other systems of records pertaining to providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056. The Privacy Act, pursuant to 5 U.S.C. 552a(k)(3), authorizes agencies to claim an exemption for systems of records that contain information concerning protective services for which access to, amendment of, or release of the accounting of disclosures of such records could compromise the effectiveness of the protective services, the safety of the individuals protected pursuant to 18 U.S.C. 3056, and the safety of the personnel providing protective services. The DoD is proposing to claim an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain recordkeeping and notice requirements, to avoid, among other harms, frustrating the purposes of the protective services for which the information was gathered.

In addition, the DoD proposes an exemption for this system of records because the records may contain information recompiled from other systems of records consisting of investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information. The Privacy Act, pursuant to 5 U.S.C. 552a(k)(5), authorizes agencies to claim an exemption for systems of records that contain information identifying sources crucial to determining suitability for holding positions of trust and who furnished information to the Government under an express promise that the source's identity would be held in confidence. The DoD is proposing to claim an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain record-keeping and

notice requirements, to prevent the compromise of the identity of such confidential sources within such investigatory material.

The DoD also proposes an exemption for this system of records because the records may contain examination and testing material recompiled from other systems of records that is used solely to determine individual qualification for appointment or promotion in the Federal service within the scope of 5 U.S.C. 552a(k)(6). The DoD is therefore proposing to claim an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain record-keeping and notice requirements, to prevent disclosure of any information that would compromise the objectivity or fairness of testing and examination material.

Finally, the DoD proposes an exemption for this system of records because the records may contain evaluation material recompiled from other systems of records that is used to determine potential for promotion in the armed services within the scope of 5 U.S.C. 552a(k)(7). In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). The DoD therefore is proposing to claim an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain record-keeping and notice requirements, to prevent disclosure of any information that would compromise the identity of confidential sources who might not have otherwise come forward to assist the Government.

Records in this system of records are only exempt from the Privacy Act to the extent the purposes underlying the exemption pertain to the record. A notice of a new system of records for DoD-0008, Freedom of Information Act and Privacy Act Records, is also published in this issue of the *Federal Register*.

## **REGULATORY ANALYSIS**

**Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that this rule is not a significant regulatory action under these executive orders.

**Congressional Review Act**

This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. Chapter 6)**

The Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency has certified that this Privacy Act rule does not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the DoD.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been determined that this rule does not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

**Section 202, Public Law 104-4, “Unfunded Mandates Reform Act”**

It has been determined that this rule does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that it will not significantly or uniquely affect small governments.

**Executive Order 13132, “Federalism”**

It has been determined that this rule does not have federalism implications. This rule does not have substantial direct effects on the States, on the relationship between the National

Government and the States, or on the distribution of power and responsibilities among the various levels of government.

### **Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”**

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or effects the distribution of power and responsibilities between the federal government and Indian tribes. This rule will not have a substantial effect on Indian tribal governments.

### **List of Subjects in 32 CFR Part 310**

Privacy.

Accordingly, 32 CFR part 310 is proposed to be amended as follows:

### **PART 310 [Amended]**

1. The authority citation for 32 CFR part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

2. Section 310.13 is amended by adding paragraph (e)(7) to read as follows:

### **§ 310.13 Exemptions for DoD-wide systems.**

\* \* \* \* \*

(e) \* \* \*

(7) *System identifier and name.* DoD-0008, “Freedom of Information Act and Privacy Act Records.”

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1); (e)(2); (e)(3); (e)(4)(G), (H), and (I); (e)(5); (e)(8); (f) and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(5), (k)(6), and (k)(7).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:



(A) *Subsection (c)(3), (d)(1), and (d)(2)--(1) Exemption (j)(2).* Records in this system of records may contain information recompiled from other systems of records maintained by a DoD component or other agency which performs as its principal function activities pertaining to the enforcement of criminal laws and contain investigatory material compiled for criminal law enforcement purposes, including information identifying criminal offenders and alleged offenders, information compiled for the purpose of criminal investigation, or reports compiled during criminal law enforcement proceedings. Application of exemption (j)(2) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records to avoid criminal penalties or disciplinary measures; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD or the other agency's ability to obtain information from future confidential sources and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(2) *Exemption (k)(1).* Records in this system of records may contain information that is properly classified pursuant to Executive order. Application of exemption (k)(1) may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information. Disclosure of classified records to an individual may cause damage to national security.

(3) *Exemption (k)(2).* Records in this system of records may may contain information recompiled from other systems of records pertaining to investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) may be necessary because access to, amendment of, or release of the

accounting of disclosures of such records could: inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records or the accounting of records to avoid criminal penalties, civil remedies, or disciplinary measures; interfere with a civil or administrative action or investigation by allowing the subject to tamper with witnesses or evidence, and to avoid detection or apprehension, which may undermine the entire investigatory process; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others.

Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(4) *Exemption (k)(3)*. Records in this system of records may contain information recompiled from other systems of records pertaining to providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056. Application of exemption (k)(3) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could compromise the effectiveness of protective services, the safety of the individuals protected pursuant to 18 U.S.C. 3056, and the safety of the personnel providing protective services.

(5) *Exemption (k)(5)*. Records in this system of records may contain information recompiled from other systems of records concerning investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information. In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). Application of exemption (k)(5)

may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could identify these confidential sources who might not have otherwise come forward to assist the Government; hinder the Government's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(6) *Exemption (k)(6)*. Records in this system of records may contain information recompiled from other systems of records relating to testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service. Application of exemption (k)(6) may be necessary when access to and amendment of the records, or release of the accounting of disclosure for such records, may compromise the objectivity and fairness of the testing or examination process. Amendment of such records could also impose a highly impracticable administrative burden by requiring testing and examinations to be continuously re-administered.

(7) *Exemption (k)(7)*. Records in this system of records may contain evaluation material recompiled from other systems of records used to determine potential for promotion in the Armed Forces of the United States. In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). Application of exemption (k)(7) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could identify these confidential sources who might not have otherwise come forward to assist the Government; hinder the Government's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others.

(B) *Subsection (c)(4) and (d)(3) and (4)*. Subsections (c)(4) and (d)(3) and (4) are inapplicable to the extent that an exemption is being claimed from subsections (d)(1) and (2).

(C) *Subsection (e)(1)*. In the collection of information for investigatory or law enforcement purposes, it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of the investigation or adjudication. In some instances, it will be only after the collected information is evaluated in light of other information that its relevance and necessity for effective investigation and adjudication can be assessed. Collection of such information permits more informed decision-making by the Department when making required disciplinary and prosecutorial determinations. Additionally, records within this system may be properly classified pursuant to executive order. Further, it is not always possible to determine relevancy or necessity of specific information in the earlier stages of responding to a FOIA or Privacy Act request or in litigation case development, including with respect to records pertaining to suitability determinations or armed services promotion evaluations that contain information about sources who were granted an express promise of confidentiality, or pertaining to testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process. Such information may later be deemed unnecessary upon further assessment. Accordingly, application of exemptions (j)(2), (k)(1), (k)(2), (k)(3), (k)(5), (k)(6), or (k)(7) may be necessary.

(D) *Subsection (e)(2)*. To collect information from the subject individual could serve notice that he or she is the subject of a criminal investigation and thereby present a serious impediment to such investigations. Collection of information only from the individual accused of criminal activity or misconduct could also subvert discovery of relevant evidence and subvert the course of justice. Accordingly, application of exemption (j)(2) may be necessary.

(E) *Subsection (e)(3)*. To inform individuals as required by subsection (e)(3) could reveal the existence of a criminal investigation and compromise investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(F) *Subsection (e)(4)(G) and (H)*. Subsections (e)(4)(G) and (H) are inapplicable to the extent exemption is claimed from subsections (d)(1) and (2).

(G) *Subsection (e)(4)(I)*. To the extent that subsection (e)(4)(I) is construed to require more detailed disclosure than the broad information currently published in the system notice concerning categories of sources of records in the system, an exemption from this provision is necessary to protect the confidentiality of sources of information, the privacy and physical safety of witnesses and informants, and testing or examination material used solely to determine individual qualifications for appointment of promotion in the Federal service. Accordingly, application of exemptions (j)(2), (k)(1), (k)(2), (k)(5), (k)(6), and (k)(7) may be necessary.

(H) *Subsection (e)(5)*. It is often impossible to determine in advance if investigatory records contained in this system are accurate, relevant, timely and complete, but, in the interests of effective law enforcement, it is necessary to retain this information to maintain an accurate record of the investigatory activity to preserve the integrity of the investigation and satisfy various constitutional and evidentiary requirements, such as mandatory disclosure of potentially exculpatory information in the investigative file to a defendant. It is also necessary to retain this information to aid in establishing patterns of activity and provide investigative leads. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined through judicial processes. Accordingly, application of exemption (j)(2) may be necessary.

(I) *Subsection (e)(8)*. To serve notice could give persons sufficient warning to evade investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(J) *Subsection (f)*. To the extent that portions of the system are exempt from the provisions of the Privacy Act concerning individual access and amendment of records, DoD is not required to establish rules concerning procedures and requirements relating to such provisions.

Accordingly, application of exemptions (j)(2), (k)(1), (k)(2), (k)(5), (k)(6), and (k)(7) may be necessary.

(K) *Subsection (g)*. Subsection (g) is inapplicable to the extent that the system is exempt from other specific subsections of the Privacy Act to which the civil remedies provisions pertain.

(iv) *Exempt records from other systems*. In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

Dated: December 16, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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